APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15328

TOMMIE GLANTON, on behalf of the ALCOA Prescription Drug Plan and all other similarly-situated plans, et al.; TARA MACKNER, on behalf of the KMart Comprehensive Health Plan
Plaintiffs–Appellants,

v.

ADVANCEPCS INC,
Defendant-Appellee

OPINION

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted
October 18, 2005—San Francisco, California

Filed October 17, 2006

Before: Alex Kozinski and Ferdinand F. Fernandez, Circuit Judges, and Terry J. Hatter, Jr., District Judge

Opinion by Judge Kozinski

KOZINSKI, Circuit Judge:

We consider whether prescription drug plan participants who have suffered no judicially cognizable injury may sue their plans' fiduciaries under the Employee Retirement Income Security Act of 1974 ('ERISA").

Facts

AdvancePCS is a pharmacy benefits management company (PBM). PBMs manage prescription drug benefit programs and seek to reduce their clients' drug costs by pooling claims and negotiating volume discounts with pharmaceutical companies. Among AdvancePCS's clients are employee welfare benefit plans sponsored by ALCOA and K-Mart.

When AdvancePCS receives a prescription from one of the plan participants, it decides whether to buy the drug preferably from a seller with whom it has negotiated a discount), reject the claim or switch the participant to another drug.

AdvancePCS pays for the drugs with plan assets after accounting for the participant's co-payment. Plaintiff allege that, in addition to earning fees from the plans, AdvancePCS has secretly been keeping the spread between what it charges the plans for drugs and what it pays suppliers—a practice plaintiffs claim violates ERISA.

Plaintiff Tommie Glanton works for ALCOA and is a member of its prescription drug plan. Plaintiff Tara Mackner was a member of the K-Mart plan, but ceased working for K-

Mart after the suit was filed and thus no longer participates in its plan.[1]

Plaintiffs sued Advanced PCS under ERISA for breach of fiduciary duty. The district court found that plaintiffs lacked standing. Plaintiffs appeal.

Analysis

1. ERISA authorizes plan participants to sue fiduciaries for losses the plan suffers from a breach of their duties. 29 U.S.C. §§ 1109, 1132(a). A plan fiduciary is defined as anyone who exerts "any discretionary authority ... respecting management of such [a] plan." 29 U.S.C. § 1002(21)(A).

AdvancePCS easily fits this definition. In choosing whether to fill a prescription or shift a participant to a different drug, it exercises discretion over the plans' assets. While AdvancePCS is not named as a plan fiduciary, the applicable section of ERISA makes no distinction between named and unnamed fiduciaries. *See* 29 U.S.C. § 1002(21)(A); see also *Kayes* v. *Pac. Lumber*, 51 F.3d 1449, 1458-61 (9th Cir. 1995). It follows that plaintiffs here are authorized to sue AdvancePCS for breach of fiduciary duty.

2. Plaintiffs, nevertheless, cannot proceed unless they have Article III standing. See Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997). They claim to meet the traditional standing requirements outlined by Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). Alternatively, they contend that they have standing as congressionally authorized representatives of the injured plans.

To establish standing under Lujan, plaintiffs must show a likelihood that the injury they have suffered will be

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[1] The parties dispute whether Mackner lost whatever standing she had when she stopped working for K-Mart. Because we conclude that Mackner lacked standing in the first place, we do not reach this question.

redressed by a favorable outcome to the litigation. *Id.* at 560-62. Plaintiffs don't claim they were denied benefits or received inferior drugs. Rather, they claim that AdvancePCS charged the plans too much for drugs, and that this caused the plans to demand higher co-payments and contributions from participants. Plaintiffs claim that, if their suit is successful, the plans' drug costs will decrease, and that the plans might then reduce contributions or co-payments. But nothing would force ALCOA or K-Mart to do this, nor would any one-time award to the plans for past overpayments inure to the benefit of participants. ALCOA and K-Mart would be free to reduce their contributions or cease funding the plans altogether until any such funds were exhausted. There is no redressability, and thus no standing, where (as is the case here) any prospective benefits depend on an independent actor who retains "broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.); *see also Fernandez* v. *Brock*, 840 F.2d 622, 627 (9th Cir. 1988).

Other circuits that have considered this issue have reached the same conclusion. *See Cent. States Se. & Sw. Areas Health & Welfare Fund* v. *Merck-Medco Managed Care*, 433 F.3D 181, 201 (2d Cir. 2005); *Horvath v. Keystone Health Plan E.*, 333 F.3d 450, 455 (3d Cir. 203); *Harley* v. *Minnesota Mining & Mfg.*, 284 F.3d 901, 906 (8th Cir. 2002).

We therefore turn to plaintiffs' argument that they have standing to bring this lawsuit as representatives of the plan. Plaintiffs rely heavily on *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), which upheld qui tam actions against an Article III standing challenge. Relators in qui tam actions are congressionally authorized to sue for redress of injuries suffered by the United States. Qui tam plaintiffs retain a

percentage of the recovery; the rest goes to the United States. The issue in Vermont Agency was whether the fact that qui tam plaintiffs have suffered "no . . . invasion" of any "legally protected right" precludes them from having Article III standing. *Id.* at 772-73.

The Court concluded that the False Claims Act (FCA) "can reasonably be regarded as effecting a partial assignment of the Government's damages claim" to the relator, and that an "adequate basis for the relator's suit [could be found] in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.* at 773. The Court noted "the long tradition of *qui tam* actions in England and the American Colonies," and that it has "routinely" entertained suits by assignees. *Id.* at 773-74.

We find the qui tam analogy inapt. Whereas qui tam actions have existed for centuries, there is no similar tradition of unharmed ERISA beneficiaries bringing suit on behalf of their plans.[2] More importantly, the FCA assigns relators a concrete stake in qui tam cases by giving them a piece of the action. *Id.* at 772. ERISA gives plan beneficiaries nothing; any monetary recovery goes to the plans—as would the benefits of any injunctive relief.[3]

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[2] Traditionally, trust law, on which ERISA is based, does not allow beneficiaries to bring suit on behalf of the trust. *See Restatement (Second) of Trusts* § 214 cmt. b. ("A particular beneficiary cannot maintain a suit for a breach of trust which does not involve any violation of duty to him.").

[3] Plaintiffs point to language in *Vermont Agency* that they claim supports their position: "It would perhaps suffice to say that *the relator here is simply the statutory agent of the United States*." 529 U.S. at 772 (emphasis added). According to plaintiffs, they, too, have been designated by statute as the agents of their respective plans, and have standing, just like qui tam relators. But, plaintiffs' truncated quotation omits an important qualifier: "in whose name (as the statute provides) the suit is brought—and that the realtor's bounty is simply the fee he receives

Plaintiffs argue, more generally, that "representative damages litigation is common—from class actions under Fed. R. Civ. P. 23(b)(3) to suits by trustees representing hundreds of creditors in bankruptcy to *parens patriae* actions by state government to litigation by and against executors of decedents' estates." *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1319 (7th Cir. 1992), quoted with approval in *United Food & Commercial Workers Union Local No. 751* v. *Brown Group, Inc.* 517 U.S. 544, 557 (1996). None of these examples is particularly relevant to our case, because in each the plaintiff has a direct stake in the outcome of the litigation. A party can only serve as class representative if he has a personal claim that is representative of the claims of other class members; while he also litigates the case on behalf of the class members. Trustees and executors, likewise, have a

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out of the United States' recovery for filing and/or prosecuting a successful action on behalf of the Government." *Id.* (emphases omitted). As the omitted portion of the sentence makes clear, the Supreme Court started with the assumption that a qui tam relator has an interest in the outcome of the lawsuit because he stands to gain a part of any recovery. The Court thus had no cause to consider the situation where a party is authorized to bring suit on behalf of another party, but is given no stake in the outcome.

The passage, read in context, is even more problematic. In the immediately succeeding sentence, the Court notes that "the statute gives the relator himself an interest in the lawsuit, and not merely the right to retain a fee out of the recovery." *Id.* (emphasis omitted). "There is no doubt, of course," the Court further noted, "that as to this portion of the recovery—the bounty he will receive if the suit is successful—a *qui tam* relator has a 'concrete private interest in the outcome of [the] suit." *Id.* (quoting *Lujan*, 504 U.S. at 573) (alteration in original). The balance of the opinion deals with the difficult question of whether Congress *may* give a third party a stake in a lawsuit seeking to redress the invasion of somebody else's rights. The Court concludes (as we note in text) that it does, on the theory that a part of the claim is assigned to the relator. Because the opinion's rationale hinges on the existence of such an assignment, it cannot apply to plaintiffs here, who have been assigned no right to any portion of the recovery.

stake in the litigation because they are acting on behalf of the estate, which owns the claims being litigated. Finally, governmental entities have a concrete stake in the proper application of the laws of their jurisdiction, giving them a sufficient basis for Article III standing in *parens patriae* cases. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).[4]

Nor can plaintiffs find comfort in the associational standing cases, where the Supreme Court has held that associations or unions may bring suit to redress the rights of their members, even though the suing entity itself suffered no injury. *See, e.g., United Food & Commercial Workers*, 517 U.S. at 558. These cases turn on the fiction that an individual member authorizes the group to sue on his behalf. As the Court discussed it in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the association "and its members are in a very practical sense identical." Id. at 459, *quoted in United Food & Commercial Workers*, 517 U.S. at 552. When the Association is "organized for a purpose germane to the subject of its member's claim . . . the association's litigators will themselves have a stake in the resolution of the dispute,

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[4] Like the district court, we find *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir. 1988), and *Waller v. Blue Cross of California*, 32 F.3d 1337 (9th Cir. 1994), inapposite. Both of these cases held that ERISA beneficiaries could seek a constructive trust for ill-gotten gains fiduciaries allegedly received as a result of breaching their duties. The question was not standing, but whether ERISA authorized a remedy that would inure to the benefit of the plan participants rather than the plan. We concluded that it did, because the plans had been dissolved and any recovery would otherwise cycle back to the wrongdoers. This removed any doubt as to standing because it gave the beneficiaries a concrete stake in the lawsuit. Plaintiffs here do not seek a constructive trust for their own benefit, or any other remedy that would entitle them to any amount recovered in this lawsuit. Nor could they, because any recovery could not inure to the benefit of AdvancePCS.

and thus be in a position to serve as the defendant's natural adversary." *United Food & Commercial Workers*, 517 U.S. at 555-56.

The theory underlying the associational standing cases does not operate in reverse: By joining the association, the member gives some indication that the association represents his interests; but in accepting his membership, the association gives no reciprocating signal that the member represents its interests. Thus, a health plan might be able to sue on behalf of its injured subscribers even if the plan suffered no injury itself, but not vice versa. To hold otherwise would turn the associational standing caselaw on its head—fatally undermining any limitation the requirement of concrete injury places on constitutional standing.

Finally, plaintiffs point to *Massachusetts Mutual Life Insurance* v. *Russell*, 473 U.S. 134, 142 n.9 (1985), where the Court noted that ERISA plan beneficiaries may bring suits on behalf of the plan in a representative capacity. We have no quarrel with this proposition—so long as plaintiff otherwise meet the requirements for Article III standing. ERISA plans are organized in a variety of ways, and no doubt some would give participants a stake in a lawsuit against fiduciaries. *See, e.g., Kayes*, 51 F.3d at 145 (plaintiffs alleged that the plan fiduciary's selection of a financially troubled insurance company was a breach of fiduciary duty that caused annuity payments owed *to the plaintiffs* to be reduced to seventy percent of their previous level). In such case, plan beneficiaries can also sue on behalf of the plans, because they will have a concrete stake in the outcome of the proceedings. Such is not the case here.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Tommie Glanton, on behalf of ALCOA Prescription Drug Plan and all other similarly-situated plans, et al.;
Plaintiff,
v.
Advance PCS Health, L.P.,
Defendant.

Tara Mackner, on behalf of the Kmart Comprehensive Healthcare Plan
Plaintiff,
v.
Advance PCS Health, L.P.,
Defendant.

ORDER
(FILED NOV. 7, 2003)

Pending before the Court are Defendant AdvancePCS Health, L.P.'s Motion for Judgment on the Pleadings (Doc. 107-1), Motion to Dismiss Plaintiff Mackner's Complaint (Doc. 152-1), and Motion to Dismiss Plaintiff Glanton's Second Amended Complaint (doc. 154-1).[5] Defendant moves to Dismiss Plaintiffs' Complaints pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure

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[5] The same issues are presented in all three motions and complaints.

for lack of standing. Oral argument was held on July 27, 2003. The Court now grants Defendant's motions.

Plaintiff Tommie Glanton is an employee of ALCOA, Inc. and a member and beneficiary of the ALCOA Prescription Drug Plan. Plaintiff Tara Mackner was, but no longer is, a member and beneficiary of the K-Mart Comprehensive Healthcare Plan. Defendant is the pharmacy benefits manager ("PBM") for these plans ("Plans"). As PBM for the Plans, Defendant administers the prescription drug benefits available to Plaintiffs and other members and beneficiaries of the Plans. Defendant contracts with retail pharmacies and drug manufacturers to provide prescription drugs at a discounted rate for the benefit of the Plans. The Plans pay Defendant administrative fees for its services. Defendant also receives money from pharmaceutical companies in the form of rebates, discounts and other compensation when Plan participants use particular pharmaceutical drugs. Defendant does not pass this compensation or savings through to the Plan and does not disclose the nature or extent of its relations with retail pharmacies or manufacturers to the Plans or their beneficiaries.

In this consolidated action, Plaintiffs seek class action certification, purporting to represent all self-funded welfare benefit plans under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1101-1462, that have retained Defendant as their PBM. Plaintiffs ask this Court to declare that Defendant is an ERISA fiduciary that has breached its duties to the Plans by engaging in practices benefiting Defendant at the expense of the Plans by engaging in practices benefiting Defendant at the expense of the Plans. They seek an accounting, restoration of funds to the plans, imposition of a constructive trust, and "any other general, equitable, or remedial relief the Court deems just and appropriate under the circumstances."

Defendant argues that Plaintiffs' Complaints must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure because Plaintiffs lack standing under Article III of the United States Constitution. They assert that Plaintiffs' Complaints fail to establish the elements required for constitutional standing because they allege injuries to the Plans, but not to the individual Plaintiffs. Defendant alternatively asserts that Plaintiffs' Complaints should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for lack of statutory standing. Plaintiffs argue that ERISA §§ 409 and 502(a)(2),(3) vest them with procedural capacity and representational standing to sue on behalf of the Plans.

Standing cannot be inferred argumentatively from averments in the pleadings; it must affirmatively appear in the record. *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215, 231 (1990). The party who seeks the exercise of jurisdiction bears the burden of alleging facts demonstrating he is a proper party to seek judicial resolution of the dispute. *Id.* Standing is an indispensable part of the plaintiff's case, and each element must be supported with the manner and degree of evidence required at the successive stages of the litigation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Warth*, 422 U.S. at 501. A complaint should not be dismissed unless it appears the movant could "prove no set of facts in support of his claim which would entitle him to relief." *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (applying standard to 12(b)(1) motion); *Parks School of Bus. V. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995)(applying standard to 12(b)(6) motion).

"The irreducible constitutional minimum of standing" contains three elements. *Lujan*, 504 U.S. at 560-62. The plaintiff must have suffered "an injury in fact—an invasion of a legally protected interest which is concrete and

particularized and actual or imminent, no conjectural or hypothetical." *Id.* The injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* Finally, "it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision." *Id.*

The Supreme Court has explained that "the actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights the invasion of which creates standing." *Warth*, 422 U.S. at 500 (citing *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972); *see also Vermont Agency of Natural Resources v. U.S. ex rel Stevens*, 529 U.S. 765, 773; *Fernandez v. Brock*, 840 F.2d 622, 629 (9th Cir. 1988). Courts considering whether standing exists in such cases must determine "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500-01; *Vermont Agency*, 529 U.S. at 772-73; *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 556-558 (1996). *See also Fernandez*, 840 F.2d at 624 (applying concept in ERISA case); *Harley v. Minnesota Mining and Manufacturing Company*, 284 F.3d 901, 905 (8th Cir. 2002).

ERISA § 409 provides that a fiduciary of a plan may be held personally liable for breach of his duties, and is subject to equitable or remedial relief as the court deems appropriate. 29 U.S.C. §1109(a). A fiduciary may be required to make good to the plan any losses to the plan resulting from the breach and to restore to the plan any profits made through use of plan assets. *Id.* Sections 502(a)(2) and (3) authorize a civil action by a participant, beneficiary or fiduciary for appropriate relief under §409 or: "(A) to enjoin any act or practice which violates any provision of this sub-chapter or

the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this sub-chapter or the terms of the plan." 29 U.S.C. 1132(a)(2),(3).

In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 144 (1985), the United States Supreme Court held that a fiduciary of an employee benefit plan could not be held personally liable to a plan participant or beneficiary pursuant to ERISA § 409 for extra-contractual compensatory or punitive damages caused by improper or untimely processing of a benefit claim. The Court determined that recovery from a fiduciary for a violation of § 409 inures to the benefit of the plan as a whole, not to individual beneficiaries and participants. *Russell*, 473 U.S. at 140. The Court explained that the drafters of § 409 were "primarily concerned with the misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." *Russell*, 473 U.S. at 142. In determining that no private right of action for extra-contractual or punitive damages existed, the Court reasoned that careful integration of six civil enforcement provisions into 502(a) provided "strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Russell*, 473 U.S. at 146 (*applying Cort v. Ash*, 422 U.S. 66, 78 (1975)).

Although the *Russell* Court determined that the relief available under § 409 was limited by the terms of §§ 409 and 502(a)(2), the Court noted § 502(a)(3) authorizes a beneficiary to bring an action against a fiduciary who has violated § 409. *Russell*, 473 U.S. at 143-44. *See also Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1462 (9th Cir. 1995); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986). In *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996), the Court held that § 502(1)(3), 29 U.S.C. 1132(a)(3), authorized a lawsuit by a beneficiary against the employer/plan administrator for

individual equitable relief for breach of fiduciary duty. *Id.* The Court observed that "appropriate" equitable relief may be available under §502(a)(3) where the remedy is consistent with ERISA and not otherwise adequately remedied by ERISA. *Id.*

The Ninth Circuit in *Amalgamated Clothing and Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1409-19 (9th Cir. 1988), considered the availability of a constructive trust as a remedy under ERISA where suit is brought on behalf of all plan participants and beneficiaries against a plan fiduciary for mismanagement of plan assets. The Court held that a constructive trust could be imposed for the benefit of all plan participants and beneficiaries where return of funds to the plan would result in a return of the funds to a fiduciary who mishandled them. *Murdock*, 861 F.2d at 1416. The Court determined that the imposition of a constructive trust would be appropriate under the circumstances because the remedy sought was linked to the terms of ERISA. *Id.* The Court observed that *Russell* supported the imposition of a constructive trust in favor of plan participants and beneficiaries where it was established that the constructive trust was "the only available means of removing the ill-gotten profits from a culpable fiduciary's hands." *Id. See also Waller v. Blue Cross of California*, 32 F.3d 1337, 1339 (9th Cir. 1994)(although plan participants and beneficiaries had no standing to seek legal damages for breach of fiduciary duty, plaintiffs had "standing to sue on behalf of all participants and beneficiaries of the plan for a constructive trust remedy to strip a fiduciary of ill-gotten profits earned from breach of his fiduciary duties").

A plan participant or beneficiary has an interest in the plan being handled by loyal fiduciaries in accordance with ERISA. *Murdock*, 861 F.2d at 1416; *Waller*, 32 F.3d at 1339-40. It would be contrary to ERISA and the principles recognized by the Supreme Court and the Ninth Circuit to

hold that plan participants and beneficiaries must establish an individual denial of benefits or harm in addition to the harm identified by statute whenever they seek relief for breach of fiduciary duty under ERISA. ERISA sets forth procedures pursuant to which a plan participant or beneficiary may bring a civil action consistent with the statute when his or her rights are invaded by a breach of fiduciary duty, and identifies the relief available to remedy the invasion. ERISA §§ 409 and 502(a)(2),(3) can properly be understood as creating duties that, when breached, may result in an injury that in turn may support constitutional standing.

Notwithstanding this determination, Plaintiffs' Complaints must be dismissed because the Court is unpersuaded that the procedural rights created by ERISA in favor of plan participants and beneficiaries authorize Plaintiffs to bring a class action on behalf of the Plans under the circumstances of this case. Absent a procedural right to pursue the relief sought, standing cannot be found. *Russell*, 473 U.S. at 145; *Fernandez*, 840 F.2d at 630. In this case, Plaintiffs allege a breach of fiduciary duty by an entity that is not a named fiduciary of the Plans. Plaintiffs do not allege wrongdoing or failure to act by the named plan fiduciaries. Although the Ninth Circuit held in *Murdock* that a plan participant or beneficiary may seek the imposition of a constructive trust on behalf of all plan participants and beneficiaries, *Murdock* involved a *plan* fiduciary that allegedly breached his duties. The court reasoned the fiduciary's ill-gotten funds would cycle back to the fiduciary if a constructive trust were not imposed. Here, Plaintiffs allege that Defendant owes fiduciary duties under ERISA, but Defendant is not a named plan fiduciary.[6] Any funds

[6] The Court recognizes that an unnamed fiduciary may be charged with breaching a duty under ERISA, however, Plaintiffs have provided no basis for extending the reasoning of *Murdock* and *Waller* to the distinguishable circumstances of this case.

recovered by virtue of this lawsuit would not return to Defendant's hands. Instead, the funds would be managed and administered by the named plan fiduciaries, who are not charged with wrongdoing. This distinction is significant because in *Murdock*, the plaintiff was the most appropriate party to allege the statutory violation and because a constructive trust was necessary to protect the money recovered. In this case, there is no similar indication that Plaintiffs are the proper parties to sue on behalf of the Plans for a violation of an alleged fiduciary duty by an entity contracting with the Plans and no equivalent basis for imposing a constructive trust.

Plaintiffs suggest that they are proper parties to bring suit because ERISA grants them "representational standing" to sue for injury to their Plans in same way that representational standing is granted in the context of *qui tam* actions, actions by an executor on behalf of an estate, or by a parent or guardian ad litem on behalf of a child. "Representational standing" may be found to exist when one person or entity is legally authorized to sue on behalf of another. *See, e.g., Vermont Agency*, 529 U.S. 765-774; *United Food and Commercial Workers*, 517 U.S. at 558; *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40-41 (1976); *Warth*, 422 U.S. at 511. However, unlike the executor in an estate action, a parent or guardian, or a realtor in a *qui tam* action, Plaintiffs are not statutorily designated as fiduciaries and are not assigned the legal responsibility to represent others. To the contrary, ERISA provides for named fiduciaries, whose legal responsibility is to act for the Plan. 29 USCA § 1102.

Moreover, even if the Court were to agree Plaintiffs were the proper parties to bring a class action against Defendant, the Court is unpersuaded that the remedy they

seek is appropriate under the circumstances. In *Bast v. Prudential Ins. Co. of America*, 150 F.3d 1103, 1011 (9th Cir. 1997), the Ninth Circuit determined a constructive trust did not "fit the mold" where it was alleged that the Defendant was unjustly enriched but did not take money from the Plan. *Id.* The Court distinguished *Murdock* and *Waller* where an identifiable portion of the beneficiaries' pension plans had been improperly taken. *Id.* In the present case, a constructive trust is sought to force Defendant to disgorge the amount of money it received from pharmaceutical companies through rebates and discounts. As in *Bast*, this case involves no "ill-gotten" profits that could be returned in the same sense as the money taken from the pension plans in *Murdock* and *Waller*, and does not involve assets held by the Plans.

IT IS ORDERED granting Defendant's Motion for Judgment on the Pleadings (Doc. 107-1) and dismissing Plaintiff Glanton's Restatement of Amended Complaint (Doc. 84-1);

IT IS FURTHER ORDERED granting Defendant's Motion to Dismiss Plaintiff Glanton's Second Amended and Restated Complaint (Doc. 154-1) and dismissing Plaintiff Glanton's Second Amended and Restated Complaint (Doc. 147-1);

IT IS FURTHER ORDERED granting Defendant's Motion to Dismiss Plaintiff Mackner's Complaint Doc. 152-1), and dismissing Plaintiff Mackner's Complaint (Case No CIV 03-0607-PHX-SRB, Doc. 1-1).

IT IS FURTHER ORDERED directing the Clerk of the Court to enter Judgment in favor of Defendant, thereby terminating this case (Civ. 02-0507-PHX-SRB, designated before consolidation as CIV. No. 03-0607-PHX-SRB).

DATED this 5 day of November, 2003.

/s/
Susan R. Bolton
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Tommie Glanton, on behalf of ALCOA Prescription Drug Plan and all other similarly-situated plans, et al.;
Plaintiff,
v.
Advance PCS Health, L.P.,
Defendant.

Tara Mackner, on behalf of the Kmart Comprehensive Healthcare Plan
Plaintiff,
v.
Advance PCS Health, L.P.,
Defendant.

JUDGMENT IN A CIVIL CASE
(FILED NOV. 7, 2003)

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED granting Defendant's Motion for Judgment on the Pleadings [107-1] and dismissing Plaintiff Glanton's Restatement of Amended Complaint [84-1]

IT IS FURTHER ORDERED granting Defendant's Motion to Dismiss Plaintiff Glanton's Second Amended and Restated Complaint [154-11] and dismissing Plaintiff Glanton's Second Amended and Restated Complaint [147-1].

IT IS FURTHER ORDERED granting Defendant's Motion to Dismiss Plaintiff Mackner's Complaint [152-1] and dismissing Plaintiff Mackner's Complaint (Case No. CIV 03-0607-PHX-SRB [1-1]).

IT IS FURTHER ORDERED directing the Clerk of the Court to enter Judgment in favor of Defendant, thereby terminating this case (CIV 02-05-70PHX-SRB, designated before consolidation as CIV 03-0607-PHX-SRB). This complaint and action are hereby dismissed.

November 7, 2003
Date

RICHARD H. WEARE
District Court Executive/Clerk

Signature

(By) Deputy Clerk

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15328

TOMMIE GLANTON, on behalf of the ALCOA Prescription Drug Plan and other similarly-situated plans, et al.; TARA MACKNER, on behalf of the Kmart Comprehensive Health Plan
Plaintiffs – Appellants,
v.
ADVANCEPCS INC,
Defendant - Appellee

ORDER
(FILED JAN. 8, 2007)

Before: KOZINSKI and FERNANDEZ, Circuit Judges, and HATTER, District Judge

Appellant's petition for rehearing and petition for rehearing en banc, and appellee's motion to amend the opinion are denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOMMIE GLANTON, on behalf of the ALCOA Prescription Drug Plan and other similarly-situated plans, and
TARA MACKNER, on behalf of the Kmart Comprehensive Health Plan
Plaintiffs/Appellants
v.
ADVANCEPCS HEALTH, L.P.
Defendant/Appellee

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REQUESTING REVERSAL

HOWARD M. RADZELY
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TIMOTHY D. HAUSER
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STATEMENT OF INTEREST

The Secretary of the United States Department of Labor has primary enforcement authority for Title I of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, et seq. The Secretary's interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir.1986) (en banc).

The issues in this case are: (1) whether ERISA authorizes plan participants and beneficiaries to bring an action for a fiduciary breach under section 502(a)(2) and (a)(3) against a defendant that is not a "named plan fiduciary" with respect to the ERISA covered plan, but that allegedly is a functional fiduciary under ERISA; (2) whether the participants have constitutional standing to bring such a suit where they have not personally suffered an injury in fact; and (3) whether they must establish their right to equitable remedies in order to maintain such a suit. The Secretary has a significant interest in these issues, both as a general matter in order to ensure that ERISA section 502(a)(2) and (a)(3) are interpreted broadly to protect participants, beneficiaries and/or fiduciaries who uncover and attempt to remedy

statutory violations, and more specifically to protect her own enforcement role under section 502.

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SUMMARY OF THE ARGUMENT

The district court erred in holding that the Plaintiffs lacked standing to bring their suit on behalf of the Plans. There is no question that participants and beneficiaries have statutory standing under section 502(a)(2) and (a)(3) of ERISA, 29 U.S.C. § 1132(a)(2) and (a)(3), to bring an action on behalf of a plan for a fiduciary breach, See Waller v. Blue Cross of California, 32 F.3d at 1339; Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d at 1409. Moreover, courts, including the Ninth Circuit have long recognized that ERISA provides a functional, as well as a formal definition of fiduciary, and thereby allows plaintiffs to sue not only those who are named fiduciaries, but also anyone who acts in a fiduciary capacity. See Acosta v. Pac. Enters., 950 F.2d 611, 618 (9th Cir. 1991) ("a person's actions, not the official designation of his role, determine whether he enjoys fiduciary status"). The district court simply misconstrued the statute and the governing case law on these points.

Furthermore, since the Appellants are statutorily authorized to bring an action on behalf of their Plans against a functional fiduciary for breach of duty, it is immaterial whether Appellants themselves suffered an injury in fact. Any alleged losses are recovered by the Plans, which have allegedly been injured by fiduciary breaches. This is enough to establish standing for Article III purposes.

I. Participants and beneficiaries are authorized under Section 502(a)(2) and (a)(3) of ERISA, 29 U.S.C. § 1132(a)(2) and (a)(3), to bring an action on behalf of their plans against a functional fiduciary for breach of duty

ERISA section 502 (a)(2), the second of ERISA's "six carefully integrated civil enforcement provisions," Russell, 473 U.S. at 146, expressly authorizes a civil action "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section [409] of this title." 29 U.S.C. § 1132(a)(2). Section 409(a), 29 U.S.C. § 1109(a), in turn, makes fiduciaries liable for breach of these duties, and specifies the remedies available against them: the fiduciary is personally liable for damages ("to make good to [the] plan any losses to the plan resulting form each such breach"), for restitution ("to restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary"), and for "such other equitable or remedial relief as the court may deem appropriate," including removal of the fiduciary. As the Supreme Court in Russell put it "[t]here can be no disagreement with the Court of Appeals' conclusion that § 502(a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § 409." 473 U.S. at 140. Nor can there be any disagreement that section 502(a)(3), by its terms, authorizes a cause of action for "appropriate equitable relief" by "a participant, beneficiary or fiduciary." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209-10 (2002); Mertens v. Hewitt Assocs., 508 U.S. 248, 253-55 (1993). Thus, the district court erred to the extent it concluded that only plan fiduciaries and not participants and beneficiaries are

"assigned the legal responsibility to sue others." Order, p. 7, [Record Excerpt, p. 156].[7]

More fundamentally, the court erred in dismissing the Complaint merely because the Appellants were suing an entity that is not a named fiduciary of the Plans. Under ERISA, a "named fiduciary" is "a fiduciary who is named in the plan instrument, or who . . . is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly." 29 U.S.C. § 1102(a). ERISA, however, "provides that not only the persons named as fiduciaries by a benefit plan, see 29 U.S.C. § 1102(a), but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets, see § 1102(21)(A), is an ERISA 'fiduciary'" Mertens, 508 U.S. at 251.

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[7] There are cases that hold that participants are not entitled to sue an employer for contributions unless they first establish that the plan trustees breached their fiduciary duties by failing to sue the employer. See Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984); Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d 912 (2d Cir. 1989). Section 502(g)(2) of ERISA, 29 U.S.C. § 1132 (g)(2), provides plan fiduciaries with remedies to enforce employer plan contribution obligations pursuant to section 515, 29 U.S.C. § 1145, but does not authorize such suits by plan participants. Thus, a participant may not bring a derivative action against the employer unless the trustees have failed to bring such a suit. See A. Scott, 4 Law of Trusts § 282.1 (3d ed. 1967) ("if the trustee holds in trust a contract right against a third person and the trustee improperly refuses to bring an action to enforce the contract, the beneficiaries can maintain a suit in equity against the trustee joining the obligor as a co-defendant"). Moreover, the delinquent contribution cases all involve participant actions against non-fiduciaries. Because the participants here are directly suing a fiduciary for fiduciary breaches, neither Struble nor Diduck support the district court's holding.

II. Participants and beneficiaries who sue under section 502(a)(2) and (a)(3) have standing to sue on behalf of their plans and thus need not show that they personally have suffered injury in fact.

It is not enough that Appellants have a statutory cause of action. They must also, of course, establish Article III standing, the requirements of which are injury in fact, causation and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Advance argues that Appellants have failed to establish injury in fact because they cannot show that they personally have been injured by any arrangements that Advance may have had with pharmaceutical companies. They note that the primary harm alleged is to the Plans and not directly to the participants and beneficiaries, and any increased costs (or conversely savings) would not necessarily be passed on to the participants and beneficiaries. However, "[t]he actual or threatened injury required by Article III may exist solely by virtue of statues requiring legal rights, the invasion of which creates standing." RJR Cab, Inc. v. Hodel, 797 F.2d 111, 118 (3d Cir. 1986) (quoting Warth v. Selden, 422 U.S. at 499-500. Thus, where, as here, an entity is alleged to have violated its statutory duties as a fiduciary to ERISA plans, that violation creates standing in those (such as the participants) who are authorized to sue to enforce those duties. See Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., with whom Blackmun and Powell, J.J., join, concurring) (statute conferred standing that would have been doubtful under Article III in the absence of the statute).

Similarly, the Supreme Court has recognized that a statute may create representational standing, whereby the statutorily-designated party sues to redress an injury suffered by another. Thus, in a False Claims Act case brought by a private party (a "qui tam relator"), who personally suffered

"no…invasion" of any "legally protected right," the Supreme Court held "that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." Vermont Agency of Natural Resources v. United States, 529 U.S. 765, 773 (2000).

More specially, in the ERISA context, the Supreme Court has expressly recognized that:

> § 502(a)(2), the enforcement provision for § 409 authorizes suit by four classes of party-plaintiffs: the Secretary of Labor, participants, beneficiaries, and Fiduciaries. Inclusion of the Secretary of Labor is indicative of Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole. Indeed, the common interest shared by all four classes is the financial integrity of the plan.

Russell, 473 U.S. at 142 n.9. Thus, Russell clarified that the enumerated parties are authorized by ERISA to bring suit on behalf of the plan, and each is statutorily empowered with representational standing to do so. See Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1162 n.7 (3d Cir. 1990) (sections 409 and 502(a)(2) only allow "individual participants to sue 'in a representative capacity on behalf of the plan'"). There is no need to show that the party authorized to sue personally has suffered an injury in fact. Rather, the party need only show that the plan may be entitled to relief.[8]

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[8] Because, as we argue in text, the plaintiffs have representational standing under section 502 to sue to redress the alleged injures to the Plans, they meet the causation and redressability prongs of Article III standing as well. Plaintiffs' claim that the disloyal actions by Advance

Indeed, in holding that ERISA does not permit claims for compensatory damages (which it termed "extra contractual") or for punitive damages, the Supreme Court reasoned that those who sue under section 502(a)(2) may do so only to recover for an injury to the plan. Russell, 473 U.S. at 148; accord In re Occidental Petroleum Corp., 217 F.3d 293, 297 n.14 (5th Cir.2000); Adamson v. Armco, Inc., 44 F.3d 650, 654 (8th Cir. 1995); Lee v. Burkhart, 991 F.2d 1004 (2d Cir. 1993); Hozier, 908 F.2d at 1162 & n.7; Bryant v. Int'l Fruit Prod. Co., 886 F.2d 132, 135 (6th Cir. 1989) (per curiam); Drinkwater v. Metro. Life Ins. Co., 846 F.2d 821, 824 (1st Cir. 1988); Sokol v. Berbstein, 803 F.2d 532, 537 (9th Cir. 1986). Given that section 502(a)(2) therefore does not encompass claims for individual relief at all, courts following Russell have denied recovery to participants and beneficiaries suing for relief under this provision. See, Hozier, 908 F.2d at 1162 n.7 (claim to recover individual benefits not authorize under sections 409 and 502(a)(2) because these provisions only allow "individual participants to sue 'in a representative capacity on behalf of the plan'"); Carr v. Malcolm & Riley, P.C., No. 90-6407, 1991 WL 67749, at *8 (E.D. Pa. Apr. 25, 1991) (same). It would be irrational, indeed, to conclude that participants must show individual harm in order to have standing to sue under section 502(a)(2), but that they cannot individually recover for that harm under that very provision.[9]

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injured the Plans, and injunctive or monetary relief could conceivably remedy that injury. Again, the focus of inquiry is on the Plans.

[9] Although section 502(a)(3) does allow claims for individual relief, as the Supreme Court held in Varity Corp. v. Howe, 516 U.S. 489, 515 (1996), there is little question that it too allows actions for "appropriate equitable relief" running to the plan. Indeed, the Supreme court granted certiorari in Varity to resolve the split in the lower courts as to whether the relief available under section 502(a)(3), like that available under section 502(a)(2), is limited to relief to the plan. Id. at 495. In holding that it is not so limited, the court in no way questioned that participants

Advance, however, relies upon the Eighth Circuit's holding in Harley v. Minnesota Mining & Mfg. Co., 284 F.3d 901, 906-07 (8th Cir. 2002), cert. denied, 537 U.S. 1106 (2003) that the participants and beneficiaries in that case lacked standing to bring fiduciary breach claims following an investment loss of close to $20 million to their defined benefit plan. The court there reasoned that the participants and beneficiaries were unable to show that they had suffered any harm from this loss because, under a defined benefit plan, the employer must cover any under-funding, and because, in this particular case, the employer (who was one of the parties being sued) had infused the plan with sufficient funds to create a sizable surplus. Id. at 903-04.

This Court should not apply the reasoning of Harley to this case for two reasons. First, Harley itself limits its holding to the "unique circumstances" of a suit against an over-funded defined benefit plan. Harley, 284 F.3d at 905. Second, and more fundamentally, the decision is simply wrong and cannot be squared with the statute or with the Supreme Court's reading of it in Russell, as we discuss above.[10]

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and beneficiaries may bring suit under section 502(a)(2) for equitable relief to remedy injuries to their plans, and many cases have allowed such suits without comment. See Wald v. Southwestern Bell Corp. Customcare Med.Plan, 83 F.3d 1002 (9th Cir. 1996).

[10] Nor is this Court's decision in Fernandez v. Brock, 840 F. 2d 622, 628 (9th Cir. 1988), to the contrary. In Fernandez, migrant farmworkers brought an action against the Secretary of the Treasury alleging that they had been harmed by the government's failure to promulgate regulations governing participation, accrual and vesting thresholds for pensions for seasonal workers. The farmworkers alleged that they might be able to obtain pension benefits if new regulations were issued that lowered the minimum hours-per-year-worked standard for participants in plans. This Court concluded that the farmworkers were required to satisfy the injury-in fact requirement of Article III. Fernandez and the cases that it cites, however, all involved actions against government officials for failure to perform a statutory duty when the statute did not expressly provide for an

We note that in the present case, however, the participants and beneficiaries may well show that they have or will likely suffer an injury in fact. The participants and beneficiaries in the Alcoa Plan are subject to a co-payment. Also, they are restricted to the use of certain formularies. If the rebates and discounts are returned to the Plans, it is possible that the resulting cost reductions or monetary relief to the Plans will benefit the participants and beneficiaries in the form of lower co-payments and less restrictive formularies, and possibly a more comprehensive benefit structure. Although the Plans' sponsors may take any recovered rebates and discounts and use these funds at their own disposal, this does not foreclose the possibility that the Appellants may benefit directly from a judgment in their favor.

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CONCLUSION

For the reasons set forth above, the Secretary requests that this Court reverse the district court's decision and conclude that participants and beneficiaries may bring an action on behalf of the plan against a functional fiduciary under ERISA section 502(a)(2) and (a)(3) for appropriate equitable relief.

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action against the government. The question in those cases was whether the invasion of a statutory right can create a sufficient injury for Article III purposes, but was simply "whether a statute that imposes statutory duties [implicitly] creates correlative procedural rights in a given plaintiff, the invasion of which is sufficient to satisfy the requirement of injury in fact in article III." Id. at 630. Here, the statute expressly provides that a participant may sue individually or on behalf of his plan to redress fiduciary violations. There is no need, therefore, to go beyond the statutory language to determine whether a participant must show individual injury in order to bring suit.

Respectfully submitted.

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APPENDIX F

1. 29 U.S.C. § 1002 provides in relevant part:

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise,

(A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or

(B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

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(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

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(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

2. 29 U.S.C. § 1003 provides in relevant part:

§ 1003. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees * * * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) of subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of title 26 (as in effect on October 22, 2004), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

3. 29 U.S.C. § 1004(a)(1)(A) provides:

§ 1004. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1003(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and – (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan.

4. 29 U.S.C. § 1009(a) provides:

§ 1009. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate. A fiduciary may also be removed for a violation of section 1111 of this title.

5. 29 U.S.C. § 1132 provides in relevant part:

§ 1032. Civil enforcement

(a) Persons empowered to bring a civil action
A civil action may be brought –

* * * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.